U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of Commissioner Victoria A. Lipnic

EEOC ACTIVITIES FOR FISCAL YEAR 2011 & 2012
(October 1, 2010 – April 10, 2012)

I. Development of the Law

A. Regulations -- Issued & Pending Regulations

1) Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68912 (issued Nov. 9, 2010)

2) Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16978 (issued Mar. 25, 2011)

3) Federal Sector Equal Employment Opportunity Complaint Processing, 74 Fed. Reg. 67839 (Dec. 21, 2009) (pending); overall federal sector review (in planning process)

4) Disparate Impact and Reasonable Factors Other The Age Under the Age Discrimination in Employment Act, 73 Fed. Reg. 16807 (Mar. 31, 2008); 75 Fed. Reg. 7212 (Feb. 18, 2010) (issued March 30, 2012)

5) Revision of Race and Ethnicity Data Collection Method

6) Revision to EEOC's FOIA Regulation to Promote Openness and Electronic Access

B. Amicus Briefs (see Appendix A for description)

FY 2011 – 29 Amicus Briefs filed in the federal courts of appeals

FY 2012 – 9 Amicus Briefs filed in the federal courts of appeals, 1 filed in federal district court

C. Commission Meetings

October 20, 2010 – Employer Use of Credit History as a Screening Tool

November 17, 2010 – Impact of Economy on Older Workers

January 19, 2011 – Human Trafficking and Forced Labor

February 16, 2011 –Treatment of Unemployed Job Seekers

March 15, 2011 – Employment of People with Mental Disabilities

June 8, 2011 – Leave as a Reasonable Accommodation

June 22, 2011 – Disparate Treatment in 21st Century Hiring Decisions

July 26, 2011 – Arrest and Conviction Records as a Hiring Barrier

November 16, 2011 – Final Regulation on Disparate Impact and Reasonable Factors Other Than Age Under the ADEA and Overcoming Barriers to the Employment of Veterans With Disabilities

February 15, 2011 - Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities.

February 22, 2012 – EEOC Strategic Plan For Fiscal Years 2012-2016.

II. Investigating, Resolving & Litigating Individual & Systemic Cases of Discrimination

A. Overall Private Sector Charges Received, Resolved & Pending

FY2009 – 93,277 (received); 85,980 (resolved); 85,768 (pending)
FY2010 – 99,922 (received); 104,999 (resolved); 86,338 (pending)
FY2011 – 99,947 (received); 112,499 (resolved); 78,136 (pending)

NOTE – Our current public data does not break out A, B & C Charges, which are critical to our Priority Charge Handling Process (PCHP).

B. Subpoena Data (April 2010 – April 2012)

The Commission voted on 99 subpoena determinations.

C. Federal Sector Adjudications

Administrative Judges held 806 hearings in FY 2010 that resulted in written or bench decisions; an additional 73 cases were settled before the hearing process concluded. In FY 2011, we project AJs will hold approximately 800 hearings that result in a written or bench decision; and approximately 50 cases will settle before the hearings process concludes.

We project that the Office of Federal Operations will issue almost 4,500 appeal decisions on behalf of the Commission in FY2011.

The full Commission voted on 14 appeal decisions between April 2010 and January 2012.

D. Litigation Data

FY 2009 – 281 cases filed; 321 resolved; 483 pending

FY 2010 – 250 cases filed; 287 resolved; 455 pending

FY 2011– 261 cases filed; 276 resolved; 442 pending

E. Litigation Voted on by the Commission (April 2010 – Sept. 2011)

1) *EEOC v. JBS USA LLC d/b/a JBS Swift & Co*., No. 10-2103 (D. Colo.) and *EEOC v. JBS USA LLC d/b/a JBS Swift & Co.*, No. 10-318 (D. Neb.)

2) *EEOC v. DHL Express (USA), Inc.*, No. 10-6139 (N.D. Ill.)

3) *EEOC v. Kaplan Career Inst.*, No. 10-2882 (N.D. Ohio)

4) *EEOC v. Verizon Delaware LLC et al.*, No. 11-1832 (D. Md.)

5) *EEOC v. Signal Int'l LLC*, No. 11-179 (S.D. Miss.)

6) *EEOC v. Global Horizon, Inc. d/b/a Global Horizons Manpower, Inc. et al.*, No. 11-257 D. Haw.) and *EEOC v. Global Horizon, Inc. d/b/a Global Horizons Manpower, Inc. et al.*, No. 11-3045 (E.D. Wash.)

7) *EEOC v. Duncan Burch Inc. d/b/a Michael's Int'l*, No. 11-2453 (S.D. Tex.)

8) *EEOC v. Old Dominion Freight Line, Inc.*, No. 11-2153 (W.D. Ark.)

9) *EEOC v. Bass Pro Outdoor Worldwide, LLC*, No. 11-3425 (S.D. Tex.).

10) *EEOC v. Texas Roadhouse*, No. 11-11732 (D. Mass.)

11) *EEOC v. Mesa Systems, Inc.*, No. 11-1201 (D. Utah)

12) *EEOC v. Mavis Discount Tire Inc.*, No. 12-741 (S.D.N.Y.)

F. Significant Settlements

1) *EEOC v. Verizon Delaware LLC et al.*, No. 11-1832 (D. Md.) -- $20M (Disability Discrimination)

2) *EEOC v. New United Motors and Manufacturing Inc.* (NUMMI) -- $6M (prior to EEOC filing disability discrimination suit)

3) *EEOC v. Denny's Inc.*, No. 06-2527 (D. Md.) -- $1.3M (Disability Discrimination)

4) *EEOC v. Supervalu Inc.*, No. 09-5637 (N.D. Ill.) -- $6.2M (Disability Discrimination)

5) *EEOC v. Apple Core Enter., Inc d/b/a Applebee's Neighborhood Grill & Bar*, No. 10-48 (D. N.D.) -- $1M (Sexual Harassment)

6) *EEOC v. Sonic Drive-In of Los Lunas Ltd and B&B Consultants Inc.*, No. 09-953 (D. N.M.) -- $2M (Sexual Harassment and Retaliation)

7) *EEOC v. U.S. Security Assoc., Inc.*, No. 09-598 (N.D. Ala.) -- $1.95M (Sexual Harassment)

8) *EEOC v. Int'l Profit Assoc.*, No. 01-4427 (N.D. Ill.) -- $8M (Sexual Harassment)

9) *EEOC v. Akai Security, Inc.*, No. 08-1274 (D. Kan.) -- $1.62M (Pregnancy Discrimination)

10) *EEOC v. 3M Co.*, No. 11-2408 (D. Minn.) -- $3M (Age Discrimination)

11) *EEOC v. Cavalier Telephone Co.*, No. 10-664 (E.D. Va.) -- $1M (Age Discrimination)

12) *EEOC v. Scrub, Inc.*, No. 09-4228 (N.D. Ill.) -- $3M (Race Discrimination)

G. Significant Court Resolutions

1) *EEOC v. Karenkim Inc. d/b/a Paul's Big M*, No. 08-1019 (N.D.N.Y.) -- $1.26M (Sexual Harassment) (reduced to $485K pursuant to statutory caps)

2) *EEOC v. Mid-American Specialties Inc.*, No. 09-2203 (W.D. Tenn.) -- $1.5M (Sexual Harassment and Retaliation)

3) *EEOC v. Minn. Dept. of Corrections*, No. 08-5252 (D. Minn.) -- $1.4M (Age Discrimination)

4) *EEOC v. CDG Mgmt., LLC*, No. 08-2562 (D. Md.) -- $7.4M (Sex Discrimination)

H. Informal Discussion Letters (April 2010 – January 2012)

1) Title VII: ADEA, & ADA: Qualification Standards and Disparate Impact, 5/19/10

2) ADA, Title VII, & ADEA: Work Opportunity Tax Credit, IRS Form 8850, 7/28/2010
3) Title VII: Criminal Records, 9/10/10
4) ADA, Title VII, & ADEA: Work Opportunity Tax Credit, IRS Form 8850 & ETA Form 9061, 9/15/10
5) ADA, GINA, Title VII & ADEA: Video Resumes, 9/21/10
6) Title VII: Use of Conviction Records and the S.A.F.E. Act, 9/22/10
7) ADEA: Disparate Impact & RFOA in the Federal Sector, 10/6/10
8) Federal EEO Laws: Training for YouthBuild Transfer Act Participants, 10/21/10
9) Title VII: Criminal History & Arrest Records, Optional Form 306 & Standard Form 85, 12/1/10
10) Record Keeping: Records kept by Contractor/Third party, 1/11/11
11) Federal EEO Laws: Strategic Plan for Federal Youth Policy, 1/20/11
12) Rehabilitation Act and Title VII: Applicant Screening using Disability-related Inquiries, Criminal History Inquiries, and Financial History Inquiries in SF 85P and SF 85P-S, 3/8/11
13) ADA & GINA: Confidentiality Requirements, 5/31/11

14) Title VII: Criminal History & U.S. Census Bureau's Hiring Practices, 6/17/11
15) ADA & GINA: Incentives For Workplace Wellness Programs, 6/24/11
16) ADEA: Coordinating Medicare with Current Employees' Benefits, 8/2/11
17) ADA: Definition Of Disability Under ADAAA, 8/12/11
18) Title VII: Criminal Records; Comment on Peace Corps Volunteer Application, 9/7/11
19) ADEA: Age-Based Pension Calculations, 10/06/11
20) GINA & Rehabilitation Act: State Department Forms - Medical History and Examination for Foreign Service, 10/11/11
21) ADA: Qualification Standards; Disparate Impact, 11/17/11

III. Outreach and Education

- Outreach programs reached approximately 250,000 persons.

- EEOC offices participated in 3,766 educational, training, and outreach events.

- The EEOC Training Institute provided fee-based training to 20,000 individuals from the private sector, local, state, and federal governments at more than 450 events.

Appendix A

Fiscal Year 2011 & 2012 Amicus Briefs

Dellinger v. Science Applications Int'l Corp., No. 10-1499 (4th Cir.) (filed Oct. 15, 2010) (filed jointly with Solicitor of Labor, arguing in an FLSA retaliation case that a prospective employer retaliated against an applicant when it discovered that the applicant had filed an FLSA claim against a prior employer).

> Status: Rejected DOL and EEOC's argument because the clear language of the statute restricts its application to "employers" of the retaliation victim. Dellinger v. Science Applications Int'l Corp., 2011 WL 3528750 (4th Cir. Aug. 12, 2011).

Jock et al. v. Sterling Jewelers, No. 10-3247 (2d Cir.) (filed Oct. 28, 2010) (arguing in a Title VII pattern or practice sexual discrimination case that the broadly worded coverage and relief provisions in mandatory arbitration agreements, which were silent on class arbitration, permitted class arbitration of Title VII claims).

> Status: Held that the mandatory arbitration agreements at issue, which were silent as to class arbitration, permitted class arbitration because "the parties intended to make available in arbitration all remedies and rights that would otherwise be available in court or before a government agency." Jock et al. v. Sterling Jewelers, 646 F.3d 113 (2d Cir. 2011).

Dediol v. Best Chevrolet Inc., et al., No. 10-30767 (5th Cir.) (filed Nov. 12, 2010) (arguing in an ADEA and Title VII religious discrimination case that the district court misapplied the "pervasive or severe" hostile work environment standard when granting summary judgment for employer even where the court noted that the underlying conduct was pervasive).

> Status: The Fifth Circuit reversed the district court's award of summary judgment and adopted EEOC's argument that (1) a hostile environment based on age is actionable under the ADEA and (2) that repeated profane references to plaintiff and strident age-related comments were sufficient to create a genuine issue of material fact regarding plaintiff's hostile work environment claim.

Granger & Descant v. Aaron's, Inc., No. 10-30789 (5th Cir.) (filed Dec. 15, 2010) (arguing in a Title VII sexual harassment case to uphold the district court's decision to equitably toll the 300-day charge filing period where plaintiff's counsel incorrectly filed a timely charge with, and repeatedly contacted, OFCCP instead of EEOC).

> Status: The Fifth Circuit affirmed, adopting the EEOC's position. Granger & Descant v. Aaron's, Inc., 636 F.3d 708 (5th Cir. 2011).

Griffin v. United Parcel Serv., Inc., No. 10-30854 (5th Cir.) (filed Dec. 22, 2010) (arguing in an ADA case that the employer failed to engage in the interactive process and to reasonably accommodate an employee with Type II diabetes under the pre-Amendments Act ADA).

> Status: The Fifth Circuit affirmed the district court's decision granting summary judgment to the employer and rejected the EEOC's arguments. Griffin v. United Parcel Serv., Inc., 661 F.3d 216 (5th Cir. 2011).

Townsend v. Benjamin Enterprises, Inc., No. 09-0197 (2d Cir.) (filed Dec. 23, 2010) (arguing in a Title VII sexual harassment and retaliation case that (1) the statutory anti-retaliation participation clause prohibits retaliation against a director of human resources for conducting an internal, pre-charge, investigation into an allegation of sexual harassment and (2) an employer is strictly liable for sexual harassment when the harasser is high enough in the corporate hierarchy to be the company's alter ego).

Status: The Second Circuit rejected the EEOC's argument that participation in an internal investigation should be considered participation within the meaning of the anti-retaliation provision because the availability of an affirmative defense under Faragher and Ellerth has made internal investigations an integral part of the statutory scheme. The Second Circuit adopted the EEOC's "alter ego" position. Townsend v. Benjamin Enterprises, Inc., 2012 WL 1605758 (2d Cir. 2012).

Cherry v. Shaw Coastal, Inc., No. 10-30846 (5th Cir.) (filed Dec. 23, 2010) (arguing in a Title VII sexual harassment case that the district court erroneously overturned a jury's verdict in favor of plaintiff because the court found that the evidence was insufficient to establish a Title VII male-male sexual harassment claim).

Status: The Fifth Circuit vacated the district court's grant of judgment as a matter of law to the defendant and restored the jury's verdict in favor of the plaintiff, adopting the EEOC's position. Cherry v. Shaw Coastal, Inc., 2012 WL 147867 (5th Cir. 2012).

Powell v. Anheuser-Busch Inc., No. 10-55167 (9th Cir.) (filed April 7, 2011) (arguing in a disability case filed under state law that a union-represented employee may not be compelled to arbitrate disability-related claims, even if the underlying collective bargaining agreement compelled arbitration, where (1) the union failed to grieve termination, (2) the collective bargaining agreement provided no guidance on how an individual could arbitrate such claims, and (3) the parties could not agree on basic issues including the cost allocation and selection of an arbitrator).

Status: The Ninth Circuit affirmed, adopting the EEOC's position in an unpublished opinion. Powell v. Anheuser-Busch Inc., 2011 WL 5234761 (9th Cir. 2011).

Dulaney v. Packaging Corporation of America, No.10-2316 (4th Cir.) (filed Jan. 28, 2011) (arguing in a Title VII sexual harassment case that the district court failed to appropriately determine whether an alleged harasser was plaintiff's co-worker or supervisor, and subsequently applied the incorrect legal standard, when the court found that employer had established the *Ellerth/Faragher* affirmative defense as a matter of law).

Status: Pending.

Ryals v. American Airlines, Inc., No. 10-11035 (5th Cir.) (filed Feb. 9. 2011) (arguing in a Title VII case alleging race, national origin, sex discrimination and retaliation that the district court inappropriately granted summary judgment for employer because a plaintiff can challenge all harassing conduct based on race, national origin, sex and retaliation if an act occurring within 300 days of her charge were part of the same hostile work environment).

Status: Pending.

Epps v. FedEx Services, No. 10-6512 (6th Cir.) (filed Mar. 2, 2011) (arguing in a Title VII race discrimination case that the district court erred in characterizing plaintiff's demotion into a non-management position as a

reduction in force, and that no heightened burden exists on plaintiffs to establish a prima facie case in RIF cases).

Status: The Sixth Circuit affirmed summary judgment for the employer, finding that the plaintiff failed to adduce any evidence rebutting the employer's legitimate, nondiscriminatory reasons for demotion/non-selection. As such, the court did not address the RIF issue briefed by the EEOC.

Lopez v. Pacific Maritime Association, No. 09-55698 (9th Cir.) (filed April 4, 2011) (arguing in an ADA failure to hire case that the district court, when analyzing possible methods for proving screen-out claims under the ADA, incorrectly applied Title VII's evidentiary standards in granting summary judgment to employer who barred applicants who failed a drug test from ever working as a longshoreman).

Status: Petition for Panel Rehearing and Petition for Rehearing *En Banc* denied, but original panel opinion modified slightly. The modified opinion acknowledges the possibility of bringing an ADA "screen-out" claim without using the traditional Title VII-type disparate impact approach (e.g., through showing a statistically significant disproportionate impact on a protected group). However, in the amended opinion, the Ninth Circuit found that the plaintiff had waived that theory.

James v. Sutliff Saturn, Inc., No. 10-4742 (3d Cir.) (filed May 27, 2011) (arguing in a race and disability discrimination case that plaintiff should be allowed to pursue his disability claim in federal court because he took all reasonable steps to amend his original charge of race discrimination filed with the state FEPA and the FEPA failed to do so).

Status: Pending.

Tibbs v. Calvary United Methodist Church, No. 11-5238 (6th Cir.) (filed June 15, 2011) (arguing in a Title VII race discrimination case that the district court, in granting summary judgment for employer, misapplied the "honest belief" rule where the manager, who witnessed the underlying behavior, terminated plaintiff for insubordination).

Status: Pending.

Rhodes v. R&L Carriers, Inc., No. 11-3054 (6th Cir.) (filed May 25, 2011) (arguing in a state law discrimination and retaliation case that the district court improperly dismissed a complaint under Twombley and Iqbal).

Status: Pending.

Hylind v. Xerox Corp., Nos. 11-1318 & 11-1320 (4th Cir.) (filed June 3, 2011) (arguing in a Title VII sexual discrimination case that the district court misapplied the "collateral source" rule where plaintiff was awarded eight years of back pay but the court deducted disability payments that plaintiff had received from employer's disability plan).

Status: Pending.

Sheppard v. David Evans & Assoc., No. 11-35164 (9th Cir.) (filed June 24, 2011) (arguing in an ADEA termination case that the district court improperly dismissed an amended complaint under Twombley and Iqbal).

Status: Pending.

McReynolds v. Merrill Lynch, No. 11-1957 (7th Cir.) (filed July 26, 2011) (arguing in a Title VII race discrimination case that the district court improperly dismissed the complaint when the court found that Title VII § 703(h) insulated the employer's compensation system from challenge because the complaint alleged that disparities in compensation were the result of intentional discrimination).

Status: Pending.

King v. PMI-Eisenhart, et al., No. 11-1876 (7th Cir.) (filed July 29, 2011) (arguing in an Equal Pay Act and Title VII case that the district court improperly granted summary judgment for employer because it applied the wrong legal standard to both the EPA and Title VII claims).

Status: Pending.

Davis v. Cintas Corp., No. 10-1662 (6th Cir.) (filed Oct. 27, 2010) (arguing in Title VII case that the district court abused its discretion in denying class certification where it erroneously viewed the case as consisting of myriad individual claims, rather than understanding that the class sought to challenge one system of allegedly discriminatory hiring, and that district court erred in rejecting the individual discrimination claim where it required the plaintiff, on summary judgment, to meet a "pretext-plus" standard).

Status: Pending.

Lewis v. Humboldt Acquisition Corp., No. 09-6381 (6th Cir.) (filed Apr. 20, 2011) (arguing in an ADA case that the Sixth Circuit should grant rehearing en banc because the "sole cause" or "sole reason" requirement is applied inconsistently within the Sixth Circuit; is unsupported by the language of the ADA, and as such is in conflict with a recent Supreme Court decision; is rejected by virtually every other court of appeals).

Status: The Sixth Circuit adopted EEOC's position that the sole cause standard did not apply to the ADA. However, the Sixth Circuit determined that the "but for" standard was appropriate because, unlike Title VII, the phrase "motivating factor" does not appear in the ADA. Lewis v. Humboldt Acquisition Corp., 2012 WL 1889389 (6th Cir. 2012).

Melone v. Paul Evert's RV Country, Inc., No. 10-17730 (9th Cir.) (filed Apr. 4, 2011) (arguing in an ADA case that plaintiff presented sufficient evidence for a jury to conclude that his ability to walk was "significantly restricted" as compared to that of the "average person in the general population).

Status: The Ninth Circuit adopted the EEOC's reasoning and reinstated the jury verdict. Melone v. Paul Evert's RV Country, Inc., 2011 WL 5071574 (9th Cir. 2011).

Mitchell-White v. NorthWest Airlines, Inc., No. 11-1294 (2d Cir.) (filed May 24, 2011) (arguing in an ADEA case that a pension plan's age-65-trigger is a facially discriminatory policy that deprives older workers of a benefit that is received by younger workers based solely on the particular worker's age and therefore it violates the ADEA).

Status: The Second Circuit affirmed. *See Mitchell-White v. Northwest Airlines, Inc.*, No. 11-1294, slip op. at 4 (2d Cir. Oct. 21, 2011) (rejecting EEOC's position that an age-65 trigger in a pension plan violated the ADEA and finding that the pension plan was not discriminatory under *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 148-49 (2008)).

Naber v. Dover Healthcare Associates, Inc., No. 11-1769 (3d Cir.) (filed Aug. 26, 2011) (arguing in an ADA case that that district court correctly recognized that a reasonable jury could find that the plaintiff's major depression is a covered disability under the ADA, as amended by the ADAAA, because it substantially limits her in a major life activity and that sleeplessness one or two nights per week is a disability).

Status: Pending.

Price, et al. v. Northern States Power Co., No. 11-1497 (8th Cir.) (filed May 3, 2011) (arguing in an Equal Pay Act case that (1) the district court erred by holding that the plaintiffs' evidence would not permit a jury to find a prima facie violation of the EPA, (2) the district court erred by focusing on whether the plaintiffs adduced "evidence of discrimination" in determining whether they raised a genuine issue of fact regarding NSP's affirmative defenses, and (3) the district court erred to the extent that it only considered evidence within the EPA's two-year statute of limitations period).

Status: The Eighth Circuit affirmed its grant of summary judgment for the employer, rejecting EEOC's position. However, the 8th Circuit recognized that evidence of wage discrimination need not be confined to the EPA's 2 year statute of limitations. Price, et al. v. Northern States Power Co., 664 F.3d 1186 (8th Cir. 2011).

Minor v. Bostwick Labs., Inc., No. 10-1258 (4th Cir.) (filed jointly with the Department of Labor on June 23, 2011) (arguing in an FLSA case that the district court erred in holding that an employer does not violate the anti-retaliation provision of the FLSA when it fires an employee because she has complained internally about perceived underpayment of overtime pay)

Status: The Fourth Circuit reversed the dismissal of a claim because "intracompany complaints qualify as protected activity within the meaning of the FLSA's anti-retaliation provision." Minor v. Bostwick Labs., Inc., 2012 WL 251926 (4th Cir. 2012).

Jackson v. FUJIFILM Mfg. USA, Inc., No. 11-1129 (4th Cir.) (filed July 29, 2011) (arguing in an ADA case for the reversal of the district court's conclusion that, as a general rule, an employee with a disability is not entitled to reassignment over a more qualified applicant for the same position, if the applicant is qualified. EEOC took no position on the factual determination that the open position in question was actually a promotion.

Status: The Fourth Circuit affirmed the district court's grant of summary judgment to the employer because the individual was not disabled under the ADA, and did not reach the issue that the EEOC opined on. Jackson v. FUJIFILM Mfg. USA, Inc., 2011 WL 4495512 (4th Cir. 2011).

Marcus v. PQ Corp., No. 11-2009 (3d Cir.) (filed September 7, 2011) (arguing in ADEA case that (1) the but-for causation standard in the ADEA only requires a plaintiff to establish that age played a determinative, but not necessarily the sole, role in the defendant's decision making process, (2) *Gross* did not create any heightened evidentiary requirement for ADEA plaintiffs, and thus did not disturb precedent on the causation requirement, and (3) the *Staub* rule about subordinate bias applies to ADEA cases as well.

Status: The Third Circuit affirmed the district court's entry of judgment in favor of the plaintiffs on their age discrimination claims. In relevant part, the court of appeals agreed with the Commission's argument as amicus curiae that Staub and Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), do not preclude use of the subordinate bias, or "cat's paw," theory of liability in claims brought under the ADEA.

D.R. Horton, Inc. and Cuda, No. 12-25764 (NLRB) (filed jointly with the Department of Labor July 20, 2011) (arguing in an NLRB case that a mandatory arbitration agreement that bars the arbitration of collective or class claims is unenforceable as a matter of federal law when the agreement prevents aggrieved employees from effectively vindicating their federal statutory rights).

Status: The NLRB held that a class action waiver was not enforceable under the National Labor Relations Act. *In re D.R. Horton*, 357 NLRB No. 184 (2012).

Myers-Desco v. Lowe's HIW, Inc., No. 11-16119 (9th Cir.) (filed Oct. 11, 2011) (arguing in a Title VII case that the district court improperly dismissed plaintiff's case for failure to exhaust administrative remedies).

Status: Pending

Pacheco v. Freedom Buick GMC Truck, Inc., No. 10-116 (W.D. Tex.) (filed _____, 2011) (arguing in a Title VII case, at the district court level, that disparate treatment because of an employee because she is transgender is discrimination because of sex).

Status: The District Court denied the EEOC's leave to file its amicus brief, but also denied employer's motion for summary judgment.

Basden v. Prof'l Transport., Inc., No. 11-2880 (7th Cir.) (filed Nov. 14, 2011) (arguing in an ADA case that the district court erred in ruling as a matter of law that the plaintiff was not a "qualified" individual with a disability where a reasonable jury could find that the limited medical leave she sought was a reasonable accommodation that would have enabled her to perform the essential functions of her job).

Status: Pending

Mandel v. M&Q Packaging Corp., No. 11-3193 (3d Cir.) (filed Dec. 22, 2011) (arguing in a Title VII sexual harassment case that the district court erred in refusing to consider evidence of harassment over 300 days old and concluding that the plaintiff was not subjectively offended by the conduct that allegedly occurred within the 300 period).

Status: Pending

Johnson v. Maestri Murrell Property Mgmt., No. 11-30914 (5th Cir.) (filed Dec. 19, 2011) (arguing in a Title VII race discrimination case that the district court improperly granted summary judgment for the employer

because the plaintiff failed to establish a prima facie case of discrimination and could not rebut the employer's legitimate, nondiscriminatory reason).

Status: Pending

Bertsch v. Overstock.com, No. 11-4128 (10th Cir.) (filed _____) (arguing in a Title VII retaliation discrimination claim that the district court improperly granted summary judgment for the employer).

Status: Pending

McDonnaugh v. Teva Specialty Pharmaceuticals, LLC, No. 11-3462 (3d Cir.) (filed Dec. 21, 2011) (arguing in a Title VII race discrimination case that the district court erred in concluding that evidence that the plaintiff, who is African-American, was fired and replaced by a Caucasian employee failed to establish the fourth prong of the plaintiff's prima facie case of racial discrimination).

Status: Pending

Robinson v. City of Philadelphia, No. 11-3852 (3d Cir.) (filed Jan. 24, 2012) (arguing in a ADEA termination case that the district court erred in concluding that to establish a violation of section 4(a)(1) of the ADEA, *Gross* requires that plaintiffs prove that age was the "sole" reason for the challenged adverse employment decision).

Status: Pending

Fried v. LVI Servs., Inc., No. 11-4791 (2d Cir.) (filed March 5, 2012) (arguing in an ADEA that the district court erred in granting summary judgment for the employer by not giving enough weight to a stray remark and concluding that plaintiff could not establish pretext).

Status: Pending

Mazzeo v. Color Resolutions Int'l, LLC, No. 12-10250 (11th Cir. 2012) (filed March 12, 2012) (arguing in an ADA and ADEA that the district court improperly concluded that (1) degenerative disc disease was not a disability and (2) plaintiff failed to establish a prima face case of age discrimination because it misapplied that standards applicable to a reduction in force).

Status: Pending